



STATE MINING AND GEOLOGY BOARD

EXECUTIVE OFFICER'S REPORT



ARNOLD
SCHWARZENEGGER
GOVERNOR

For Meeting Date: November 12, 2009

Agenda Item No. 6: Consideration for Approval of a Request for Exemption from the Requirements of the Surface Mining and Reclamation Act (SMARA, Public Resources Code Section 2710 et seq.) Pursuant to Section 2714(f) for the Natomas Urban Development Borrow Site, Sacramento Area Flood Control Agency, Sacramento County.

INTRODUCTION: The Surface Mining and Reclamation Act of 1975 (SMARA) allows for a one-time exemption for certain surface mining operations should the State Mining and Geology Board (SMGB) determine the operation to be of an infrequent nature and involve only minor surface disturbances. Shute, Mihaly & Weinberg, LLP., on behalf of the Sacramento Area Flood Control Agency (SAFCA), has submitted a request for a one-time exemption from SMARA for removal of borrow material from the Natomas Urban Development Site (NUD Site), located in Sacramento County. The SMGB has the statutory authority to consider and grant such an exemption under certain conditions.

STATUTORY CONSIDERATIONS: SMARA allows for a one-time exemption pursuant to Article 1 of Public Resources Code (PRC), Division 2, Chapter 9, Section 2714(f), which states:

"Any other surface mining operations that the board, as defined by Section 2001, determines to be of an infrequent nature and which involve only minor surface disturbances."

Before exemptions from the provisions of SMARA are granted, the SMGB, pursuant to SMGB Resolution No. 93-6, considers the following four criteria:

Criteria 1 - Compliance with the California Environmental Quality Act

(CEQA): Pursuant to PRC Section 2712(a), has an environmental review been completed for the proposed activity either separately or as part of a larger project? PRC Section 2712(a) states *"It is the intent of the Legislature to create and maintain an effective and comprehensive surface mining and reclamation policy with regulation of surface mining operations so as to assure that: (a) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses."*



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Criteria 2 - Local authority: Pursuant to PRC Sections 2715 and 2770(a), is the proposed activity permitted or otherwise authorized by a local lead agency? PRC Section 2715 states “No provision of this chapter or any ruling, requirement, or policy of the board is a limitation on any of the following:

(a) On the police power of any city or county or on the power of any city or county to declare, prohibit, and abate nuisances.

(b) On the power of the Attorney General, at the request of the board, or upon his own motion, to bring an action in the name of the people of the State of California to enjoin any pollution or nuisance.

(c) On the power of any state agency in the enforcement or administration of any provision of law which it is specifically authorized or required to enforce or administer.

(d) On the right of any person to maintain at any time any appropriate action for relief against any private nuisance as defined in Part 3 (commencing with Section 3479) of Division 4 of the Civil Code or for any other private relief.

(e) On the power of any lead agency to adopt policies, standards, or regulations imposing additional requirements on any person if the requirements do not prevent the person from complying with the provisions of this chapter.

(f) On the power of any city or county to regulate the use of buildings, structures, and land as between industry, business, residents, open space (including agriculture, recreation, the enjoyment of scenic beauty, and the use of natural resources), and other purposes.”

PRC Section 2770(a) states “Except as provided in this section, no person shall conduct surface mining operations unless a permit is obtained from, a reclamation plan has been submitted to and approved by, and financial assurances for reclamation have been approved by, the lead agency for the operation pursuant to this article.”

Criteria 3 - End use of the mining or borrow site: Pursuant to PRC Sections 2711(b) and 2712, is the end use or proposed end use of property on which the activity is proposed to occur defined? PRC Section 2711(b) states “The Legislature further finds that the reclamation of mined lands as provided in this chapter will permit the continued mining of minerals and will provide for the protection and subsequent beneficial use of the mined and reclaimed land.”

PRC Section 2712 states “It is the intent of the Legislature to create and maintain an effective and comprehensive surface mining and reclamation policy with regulation of surface mining operations so as to assure that:

(a) Adverse environmental effects are prevented or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses.



(b) The production and conservation of minerals are encouraged, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment.

(c) Residual hazards to the public health and safety are eliminated.”

Criteria 4 - Impacts of the operation on commercial activities: Pursuant to PRC Section 2714(b), have the potential impacts on commercial interests resulting from the proposed activity been considered? PRC Section 2714(b) states “Onsite excavation and onsite earthmoving activities that are an integral and necessary part of a construction project that are undertaken to prepare a site for construction of structures, landscaping, or other land improvements, including the related excavation, grading, compaction, or the creation of fills, road cuts, and embankments, whether or not surplus materials are exported from the site, subject to all of the following conditions:

(1) All required permits for the construction, landscaping, or related land improvements have been approved by a public agency in accordance with applicable provisions of state law and locally adopted plans and ordinances, including, but not limited to, Division 13 (commencing with Section 21000).

(2) The lead agency’s approval of the construction project included consideration of the onsite excavation and onsite earthmoving activities pursuant to Division 13 (commencing with Section 21000).

(3) The approved construction project is consistent with the general plan or zoning of the site.

(4) Surplus materials shall not be exported from the site unless and until actual construction work has commenced and shall cease if it is determined that construction activities have terminated, have been indefinitely suspended, or are no longer being actively pursued.”

BACKGROUND: The SMGB received a request from Shute, Mihaly & Weinberger, LLP., on behalf of SAFCA, for a one-time exemption from SMARA for removal of borrow material from the NUD Site, located in Sacramento County, in correspondence dated September 29, 2009.

As stated in the September 29, 2009 correspondence, the proposed borrow site is located approximately 2000 feet from the relocated Riverside Canal, and is essential for specific improvements to the Natomas Levee and to the Riverside Canal. More than 85,000 cubic yards of materials are anticipated to be extracted from the proposed borrow site which encompasses approximately 20 acres.



DISCUSSION:

General Threshold Criteria: Pursuant to PRC Section 2714(d), SMARA does not apply to operations where “*Prospecting for, or the extraction of, minerals for commercial purposes where the removal of overburden or mineral product total less than 1,000 cubic yards in any one location, and the total surface area disturbed is less than one acre.*” Based on the description of the project, 85,000 cubic yards of material are anticipated to be extracted. This quantity is not considered a minor surface disturbance, and is 85 times greater than the 1,000 cubic yard threshold allowed. In addition, the borrow site(s) is on the order of about 20 acres, significantly greater than the one acre threshold allowed.

Exemption Criteria: It is recognized, however, that not all surface mining operations are an efficient “fit” under SMARA, and that many projects of limited size, duration, economic and environmental impact would be prevented, delayed, or rendered uneconomic if the requirements of SMARA were fully applied. To address these special situations, SMARA provides the SMGB with authority under PRC Section 2714(f) to grant exemptions under specific conditions when the proposed activity is of an infrequent nature and involves only minor surface disturbance.

The proposed project 1) exceeds SMARA's minimum thresholds by disturbing more than one acre of land and 1,000 cubic yards of material for commercial purposes, and 2) is not a part of an on-site construction project that may be exempt from SMARA pursuant to the requirements under PRC Section 2714(b); however, one-time exemptions have been granted by the SMGB in the past in instances where such thresholds have been significantly exceeded.

The SMGB must contemplate four specific criteria, as discussed above, in considering granting a one-time exemption:

Criteria No. 1: Pursuant to PRC Section 2712(a), has an environmental review been completed on the proposed activity either separately or as part of a larger project?

Finding No. 1: The Phase 4a Project consists of improvements to a portion of the perimeter levee system protecting the Natomas Basin in Sacramento and Sutter Counties, and associated landscape and irrigation/drainage infrastructure modifications proposed by SAFCA. The one-time exemption from SMARA request is for an activity associated with this larger project. A Draft Environmental Impact Statement/Draft Environmental Impact Report on the Natomas Levee Improvement Program, Phase 4a Landslide Improvements Project (State Clearinghouse No. 2009032097), dated August 28, 2009, was



prepared for the United States Corps of Engineers, Sacramento District, by SAFCA.

Criteria No. 2: Pursuant to PRC Sections 2715 and 2770(a), is the proposed activity permitted or otherwise authorized by a local lead agency?

Finding No. 2: Although all required or potentially required permits are not in place at the time this Executive Officer report was prepared, Sacramento County is the lead agency pursuant to SMARA, is the local permitting authority, and is a member of SAFCA (i.e., the five members of Sacramento County's Board of Supervisors are all members of SAFCA's Board of Directors). Thus, it could be inferred that although the proposed project activities are not currently permitted, such activities would be authorized, and permitted, as appropriate, by the County prior to conduct of such activities.

Criteria No. 3: Pursuant to PRC Sections 2711(b) and 2712, is the end use or proposed end use of property on which the proposed activity is to occur defined?

Finding No. 3: The end use or proposed end use of property on which the activity is proposed is defined as marsh and uplands.

Criteria No. 4: Pursuant to PRC Sections 2714(b), have the potential impacts on commercial interests resulting from the proposed activity been considered?

Finding No. 4: The proposed materials to be excavated from the NUD site are proposed to be used solely for the SAFCA's Phase 4a Project. Although the materials to be excavated will not be exported or otherwise interfere with commercial activities, an evaluation or assessment of acceptable materials from existing operators in the vicinity of the site was not provided. For discussion purposes, when the SMGB evaluated the request from CalTrans for a one-time exemption from SMARA for their Willits Bypass project, a demonstration was made by Caltrans that commercial providers and surface mine operators in the vicinity of the proposed project could not provide sufficient materials that met the specific design parameters required for the project.

Other Considerations: The SMGB previously considered a one-time exemption from SMARA for the Three Rivers Levee Improvement Authority (TRILIA) for their Feather River Levee Improvement Project, located within the County of Yuba. Based on review of the 2008 Reclamation Plan, it was determined by Department of Conservation Office of Mine Reclamation (OMR) and SMGB staff that several borrow sites associated with the project



were deemed onsite excavations and onsite earth moving activities that were an integral and necessary part of the levee construction project, and it was demonstrated that all required permits had been obtained, applicable environmental analyses were completed, and no surplus materials were to be exported from the construction site. Therefore, these borrow pits met all the criteria for an onsite construction exemption pursuant to PRC Section 2714(b)(1) through 2714(b)(4). However, two borrow sites were not considered onsite excavations or onsite earth moving activities, since they were not physically within the project area, or immediately adjacent to the project area, and were determined to be subject to the requirements of SMARA. At its July 9, 2009, regular business meeting, the SMGB subsequently approved a reclamation plan and financial assurance cost estimate for both of the 'non-exempt' sites.

CONSIDERATIONS BEFORE THE SMGB: The Executive Officer can deny a one-time exemption request if, upon review, the request does not comply with the criteria set forth in PRC Section 2714(d). However, this matter can also be placed before the SMGB should 1) a request be made by one SMGB member; 2) the Executive Officer cannot come to a clear consensus; or 3) if controversy arises surrounding the request.

In cases when a request comes before the SMGB, the SMGB can grant a one-time exemption on a case-by-case basis. Prior to granting such exemptions, the SMGB considers and must assure that the following criteria have been fully addressed:

- 1) Compliance with the California Environmental Quality Act (CEQA);
- 2) Local authority;
- 3) End use of the mining or borrow site; and
- 4) Impacts of the operation on commercial activities.

EXECUTIVE OFFICER'S RECOMMENDATION: It is the Executive Officer's conclusion that the one-time exemption request does not meet the requirements of SMARA and the SMGB's criteria for consideration of such exemptions, and is inconsistent with previous determinations made by the SMGB. Based on the information before SMGB staff, and analysis and findings set forth above, it is the Executive Officer's recommendation that the SMGB at this time deny the request for a one-time exemption.



SUGGESTED SMGB MOTION:

To deny the request for a one-time exemption:

Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB find that the project as proposed by Shute, Mihaly & Weinberger, on behalf of the Sacramento Area Flood Control Agency, and as described in this report and its attachments, is subject to the requirements of SMARA, and that the SMGB deny a one-time exemption from SMARA for this project under its authority provided by Public Resources Code Section 2714(f).

OR

To approve the request for a one-time exemption:

Mr. Chairman, in light of the information before the SMGB today, I move that the SMGB find that the project as proposed by Shute, Mihaly & Weinberger, on behalf of the Sacramento Area Flood Control Agency, and as described in this report and its attachments, is not subject to the requirements of SMARA, and that the SMGB grant a one-time exemption from SMARA for this project under its authority provided by Public Resources Code Section 2714(f).

Respectfully submitted:

Stephen M. Testa
Executive Officer